

1 The Honorable Ronald B. Leighton
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7 **UNITED STATES DISTRICT COURT**
8 **WESTERN DISTRICT OF WASHINGTON**
9 **AT TACOMA**

10 CHERYL KATER and SUZIE KELLY,
11 individually and on behalf of all others
12 similarly situated,

13 *Plaintiffs,*

14 *v.*
15 CHURCHILL DOWNS INCORPORATED, a
16 Kentucky corporation, and BIG FISH
17 GAMES, INC., a Washington corporation.

18 *Defendants.*

19 No. 15-cv-00612-RBL

20 **PLAINTIFFS' SURREPLY TO**
21 **DEFENDANTS' REPLY IN SUPPORT**
22 **OF RULE 23(d) MOTION**

23 **ORAL ARGUMENT REQUESTED BY**
24 **PLAINTIFFS**

25 Noting Date: February 14, 2020

26 MANASA THIMMEGOWDA, individually
27 and on behalf of all others similarly situated,

28 *Plaintiff,*

29 *v.*
30 BIG FISH GAMES, INC., a Washington
31 corporation; ARISTOCRAT
32 TECHNOLOGIES INC., a Nevada
33 corporation; ARISTOCRAT LEISURE
34 LIMITED, an Australian corporation; and
35 CHURCHILL DOWNS INCORPORATED, a
36 Kentucky corporation,

37 *Defendants.*

38 No. 19-cv-00199-RBL

39 **PLAINTIFF'S SURREPLY TO**
40 **DEFENDANTS' REPLY IN SUPPORT**
41 **OF RULE 23(d) MOTION**

42 **ORAL ARGUMENT REQUESTED BY**
43 **PLAINTIFF**

44 Noting Date: February 14, 2020

1 Defendants have chosen to predicate their Reply Brief, Dkts. 169 / 120, primarily on a
 2 new slate of anonymous, unsupported, and false statements accusing Plaintiffs' counsel of
 3 unethical conduct. The "support" for these statements comes from the declaration of Defendants'
 4 counsel, which is vague and not based on her personal knowledge. Accordingly, Plaintiffs move
 5 pursuant to Local Civil Rule 7(g) to strike paragraphs 3-6 of the Declaration of Lindsey Barnhart
 6 as well as each portion of the Reply Brief based on those paragraphs.

7 **I. Defendants' False Accusation Of Using Clients As "Conduits" Should Be Stricken.**

8 Of the volley of accusations Defendants lob, perhaps the most charged is the insinuation
 9 that Plaintiff's counsel is using a client as a "conduit" to provide legal advice—via Facebook—to
 10 class members. Reply Brief at 5; *accord* Dkt. 164 / 115 at 10. The predicate for Defendants'
 11 accusation is that, out of the more than 1,000 comments that have been posted on Facebook
 12 about an advertisement for www.nocasinoarbitration.com, some 300 of them have apparently
 13 been posted by the Facebook user going by the alias "Sara Brown" (who Defendants surmise is a
 14 client of Plaintiff's counsel). *Id.*

15 This accusation is false. That Facebook user is not a client of Plaintiffs' counsel, and
 16 Plaintiffs' counsel has never communicated with her about the Facebook advertisement (much
 17 less requested that she post anything on Facebook or otherwise communicate with absent class
 18 members on Plaintiffs' counsel's behalf). Declaration of Todd Logan ("Logan Decl.") ¶ 3. And
 19 the Court need not simply take an attorney's word for it here: "Sara Brown" herself—who
 20 apparently believes Defendants are "spy[ing]" on her both on Facebook and in Big Fish
 21 Casino—has taken to Facebook to respond directly to Defendants. *See* Logan Decl. ¶ 4.¹ In her
 22 words, she is "NOT an Edelson client," Edelson "did NOT attempt to solicit" her; Edelson was
 23 "VERY clear that they were limited in what they could discuss with [her] since [she] is NOT a

24
 25 ¹ To be clear: Plaintiff's counsel had no hand in "Sara Brown's" decision to respond to
 26 Defendants on Facebook. *See* Logan Decl. ¶ 5. In fact, Plaintiff's counsel has not communicated
 27 with "Sara Brown" since prior to January 24, 2020. *Id.* And again, Plaintiff's counsel has never
 communicated with "Sara Brown" about the Facebook advertisement, much less have they
 requested that she post anything on Facebook or otherwise communicate to absent class
 members on Plaintiff's counsel's behalf. *See id.* ¶ 3.

1 client,” and Defendants’ use of her Facebook posts represents “YET ANOTHER PATHETIC
 2 ATTEMPT TO PUSH THE LITTLE GUY AROUND FOR TRYING TO KEEP HIS RIGHTS.”
 3 *See id.*; Exhibit 1 to Logan Decl.

4 Because Defendants’ accusation is false, the Court should strike paragraphs 3-4 of the
 5 Barnhart Declaration as well as each portion of the Reply Brief based on those paragraphs.

6 **II. Defendants’ Accusations Based On Anonymous Hearsay Should Be Stricken.**

7 Defendants’ remaining allegations of purported misconduct are based entirely on their
 8 attorney’s vague recounting of “understandings” she has developed about putative class
 9 members, with no indication as to who those anonymous people are or how she developed these
 10 understandings. A declaration of counsel must be based on personal knowledge only. *Bank Melli*
 11 *Iran v. Pahlavi*, 58 F.3d 1406, 1412 (9th Cir. 1995). Defendants’ counsel’s use of the phrase “I
 12 understand” and references to what users “reported” demonstrate that she lacks such knowledge.
 13 *See Nielson v. Sports Auth.*, No. 11-cv-4724, 2013 WL 3388534, at *4 (N.D. Cal. July 8, 2013);
 14 *Sterling Acceptance Corp. v. Tommark, Inc.*, 227 F. Supp. 2d 454, 459 (D. Md. 2002) (striking
 15 affidavit “because the words ‘my understanding’ indicate a lack of personal knowledge”). The
 16 declaration provides no reason to believe that several of these individuals exist, let alone made
 17 the comments attributed to them, which is reason alone to strike those statements. And if that
 18 were not enough, then the post of “Sara Brown” should leave no lingering doubt that defense
 19 counsel lacks personal knowledge of the matters that she is attempting to attest to.

20 Defendants use their counsel’s declaration to insinuate that Plaintiffs’ counsel are forging
 21 opt-out letters or otherwise exercising discretionary decision-making over which Website visitors
 22 send opt-out letters. *See* Reply Brief at 1 (“Reports from BFC users confirm that Edelson’s
 23 communications are misleading. BFC users have reportedly: (1) received via email a signed opt-
 24 out letter in their name, despite not wanting to sign any such letter”). That accusation is
 25 unsupported, outrageous, and categorically false. The only evidence offered in support is
 26 Defendant’s counsel’s declaration that “[o]ne user reported receiving a completed opt-out letter
 27 signed in her name,” with no details about who this user is, where the report was made, or how

1 the declaring attorney learned about it. Setting aside the obvious unreliability of counsel's
 2 declaration, the allegation is demonstrably false. The only way for the Website to send an opt-out
 3 letter is for a visitor to fill out the form and click "sign and send," and when a visitor does so, the
 4 Website causes a letter to automatically be mailed from a third-party facility. Logan Decl. ¶ 6.
 5 Plaintiffs' counsel do not review the letters before they go out, and they certainly are not signing
 6 and sending opt-out letters on behalf of absent class members without their specific consent. *Id.*²
 7 This false allegation should be stricken.

8 Defendants make three more allegations of purported misconduct: that one class member
 9 "reported receiving communications from a law firm encouraging the user to opt out of the Big
 10 Fish Games Terms of Use dispute resolution provision"; another "reported being contacted by a
 11 law firm regarding a class action suit against Big Fish Games"; and yet another "reported being
 12 contacted daily by attorneys, who encourage the user to be part of a class action." Barnhart Decl.
 13 ¶ 6.³ Again, these threadbare accusations are based solely on unsupported, unreliable, and
 14 anonymous hearsay recounted in a vague manner by Defendants' counsel. None of the
 15 statements even identify a law firm associated with the purportedly bad acts, let alone suggest a
 16 connection to Plaintiffs' counsel. To the extent Defendants allege that Plaintiffs' counsel has
 17 engaged in impermissible solicitation, those allegations are categorically untrue. Logan Decl. ¶ 7.

18 * * *

19 The Court should strike paragraphs 3-6 from the Barnhart Declaration as well as the
 20 following pages and lines from Defendant's Reply Brief: 1:10-15; 3:14-23; 4:12-20; and 5:1-20.

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 23 ² To the extent Defendants insinuate that the Website is so confusing that the thousands of
 24 absent class members who have used it to send opt-out letters have done so without
 25 understanding what they were doing, that should have been raised in the initial motion, not for
 26 the first time on reply. In any event, as the Court will see when it examines the Website, its intent
 27 and function could not be more clear.

³ Defendants also grouse that some class members who used the Website to send opt-out
 letters later received an email about Defendants' recent lobbying efforts to gut the statute
 underlying these lawsuits. *See* Reply Brief at 1. That is a non-sequitur. Plaintiff's counsel's
 choice to apprise consumers of Defendants' lobbying efforts has nothing to do with the fair
 administration of these lawsuits.

DATED this 19th day of February, 2020.

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